

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of August 19-20, 1982

The Committee on Rules of Practice and Procedure met in Bar Harbor, Maine, on August 19-20, 1982. All members of the Committee were present except Circuit Judge Amalya L. Kearse. Mr. Spaniol, the Secretary to the Committee, was also present.

Judge Ruggero J. Aldisert, Chairman of the Advisory Committee on Bankruptcy Rules, Mr. Norman H. Nachman, a Committee member, and Professors Lawrence P. King and Walter J. Taggart, reporters to the Committee, attended the meeting and discussed the proposed new bankruptcy rules.

Judge Walter E. Hoffman, Chairman of the Advisory Committee on Criminal Rules, and Professor Wayne R. LaFave, reporter to the Committee, presented the Advisory Committee's recommendations for amendments to various rules of criminal procedure that were circulated to the bench and bar for comment in October 1981.

AGENDA I. Opening Remarks

Judge Gignoux welcomed Judge Wade H. McCree as a new member of the Committee following his recent appointment by the Chief Justice. Because of prior commitments, Judge Amalya Kearse, also a newly-appointed Committee member, was unable to attend the meeting. Judge Gignoux also announced that Judge Pierce Lively of the Sixth Circuit, a member of the Appellate Rules Advisory Committee, had been named by the Chief Justice to succeed Judge Robert A. Ainsworth, Jr., as the Chairman of that Committee.

Judge Gignoux reviewed the Agenda briefly, calling attention to the three sets of rules to be considered. Judge McGowan stated that the Chief Justice saw no problem with the submission of all three sets of rules to the Supreme Court at the same time. The Chief Justice also indicated to Judge McGowan that he had not had an opportunity to discuss with members of the Court the legislative proposal to transfer rule-making authority out of the Supreme Court.

AGENDA II. Minutes of the Last Meeting

The minutes of the Committee meeting held on June 21-22, 1982, as amended by written comments previously submitted by Committee members, were approved.

AGENDA III. Advisory Committee on Bankruptcy Rules

Judge Aldisert, on behalf of the Advisory Committee on Bankruptcy Rules, formally presented a proposed new set of bankruptcy rules together with a written Committee report (Gap Report) and a Preface to accompany the rules.

The Committee discussed the potential impact of any legislation enacted by the Congress as a result of the recent Supreme Court decision in the Northern Pipeline case. Judge Aldisert and Professor King were of the view that if bankruptcy judges were made Article III judges and the bankruptcy code was not otherwise amended, no change in the draft rules would be required. If bankruptcy judges were given Article III status and the provisions of the bankruptcy code with respect to appeals were changed, some minor changes in the rules would be required. If, on the other hand, bankruptcy judges were not given Article III status, changes would be required in Rule 7001 pertaining to adversary proceedings and a new rule on the transfer of cases may be needed.

In view of these uncertainties, Judge Gignoux asked for suggestions on how to frame an appropriate recommendation to the Judicial Conference. Judge Aldisert suggested that the rules be sent forward to the Judicial Conference with a recommendation that they be adopted with certain "caveats". After Congress acts on any new legislation, technical amendments to the rules may be necessary and the Standing Committee should be authorized by the Conference to submit them to the Supreme Court, either directly, or perhaps through the Executive Committee of the Conference.

It was agreed that Mr. Spaniol, with the assistance of Professor King, would prepare a press release covering the Judicial Conference approval of the bankruptcy rules to go out immediately after the Judicial Conference session.

The Committee thereupon continued the discussion of specific bankruptcy rules that began at the last meeting in June. Judge Aldisert stated that the Advisory Committee had decided against the inclusion of a rule permitting bankruptcy judges to appoint special masters. The Committee felt that this would eliminate an area in which charges of "cronyism" had previously been leveled at the bankruptcy system. Furthermore the Committee felt that bankruptcy judges should be directly involved in cases and should not delegate to masters.

Judge Aldisert stated that the time periods contained in the rules are controversial. Some commentators stated that time limits were too short and others that they were too long. This led the Committee to conclude that time periods were probably satisfactory. Professor King pointed out that the problem is primarily one of permitting the court to enlarge or reduce the times specified in the rules. He pointed out that the time for filing claims is inflexible, but that all other time periods are subject to enlargement or reduction.

Judge Aldisert further stated that the Committee had agreed upon a dynamic approach to the application of the rules of civil procedure to bankruptcy practice. This means that future changes

in those civil rules made applicable to bankruptcy procedure will apply.

Judge Aldisert also pointed out that in view of the problem encountered in the Congress with the proposed amendment to Rule 4 of the Rules of Civil Procedure pertaining to service of process, the Advisory Committee decided to amend Rule 7004, as previously circulated, to conform the procedure to current practice under bankruptcy Rule 704. The present bankruptcy rule has presented no problem.

The Committee then reviewed a list of suggested stylistic amendments submitted by Mr. Marshall, most of which were adopted.

Mr. Hickey moved that the Committee adopt the proposed new bankruptcy rules and authorize their transmission to the Judicial Conference with a recommendation that they be approved by the Conference and transmitted to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to the Congress pursuant to law; that the Standing Committee be authorized by the Conference to submit directly to the Supreme Court any technical amendments to the rules that may be required by legislation enacted by the Congress in response to the Northern Pipeline case; and that the Conference approve the official forms which are to become effective when the new bankruptcy rules are finally adopted. The motion was unanimously approved.

AGENDA IV. Advisory Committee on Criminal Rules

Judge Hoffman, with the assistance of Professor LaFave, presented proposed amendments to various rules of criminal procedure, which were accompanied by Advisory Committee Notes. In addition, Judge Hoffman submitted a written report (Gap Report) detailing the consideration given to the proposed amendments following their circulation to the bench and bar. After full explanation of the changes proposed and the adoption of minor clarifying changes, the Committee unanimously approved the proposed amendments to Rules 6, 11, 12, 12.2, 16, 23, 35, 55 and 58. The Committee also approved the proposed amendments to Rule 32, but asked the reporter to insert in the Advisory Committee Note a statement to the effect that the Bureau of Prisons and the Parole Commission are free to make provision for the disclosure of a presentence report to inmates and their counsel.

In its consideration of the proposed amendment to Rule 23, the Committee requested the reporter to look into the prospects of devising a rule, similar to the practice in the state of Vermont, that would advise jurors not to disclose information concerning their deliberations.

The Committee thereupon approved the proposed amendments to the criminal rules submitted by the Advisory Committee and

authorized their transmittal to the Judicial Conference with a recommendation that they be approved by the Conference and transmitted to the Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to the Congress pursuant to the law.

AGENDA V. Proposed Amendments to the Federal Rules of Civil Procedure

A. At its last meeting the Committee approved the proposed amendments to the civil rules submitted by the Advisory Committee with certain modifications, but reserved final action on the amendments to Rule 16. Upon further review of proposed Rule 72(a) the Committee decided to add the words "modify or" in line 8 to authorize the district judge to either "modify" or "set aside" a magistrate's order on a non-dispositive motion. The second paragraph of the Advisory Committee Note to Rule 72(a) was also modified.

The proposed amendments to Rule 16 were discussed at some length. Upon the conclusion thereof the Committee voted 5 to 1 to approve the amended rule.

Thereupon the Committee voted to approve the entire set of civil rules amendments and to transmit them to the Judicial Conference with a recommendation that they be approved by the Conference and transmitted to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

B. Judge Gignoux informed the Committee that by act of Congress the effective date of the proposed amendment to Rule 4 of the Federal Rules of Civil Procedure was postponed until August 1, 1983. He also indicated that Congress may soon consider legislation amending the rule. If such a bill is introduced in the Congress, Mr. Spaniol was requested to send a copy to every Committee member.

AGENDA VI. Statement of Operating Procedures

The Committee reviewed a draft Statement of Operating Procedures previously submitted by Mr. Spaniol, made several editorial changes and authorized conversion of the Statement into an article to be submitted for publication in the American Bar Journal with Mr. Spaniol's by-line. The Statement is to be appended to the Committee's report to the Judicial Conference as an informational item.

AGENDA VII. Reporter to the Standing Committee

At its last meeting, the Committee considered recommending the appointment of a reporter to the Standing Committee "when need arises". An inquiry by Professor Remington concerning the meaning of the words "when need arises" generated a full

discussion. Professor Remington asked whether the Committee desired the appointment of a reporter immediately to be used only when need arises or whether the appointment is to be made later when the need arises.

After full discussion the proposal to recommend the appointment of a reporter to the Standing Committee was withdrawn. It will be added to the Agenda for the next meeting. At that time the Committee will broadly consider its future work and the overall organization of the rules program.

AGENDA VIII. Advisory Committee on Appellate Rules

As indicated above, Judge Pierce Lively has been named the new Chairman of the Appellate Rules Committee. Mr. Spaniol reported that Judge Lively and the reporter, Kenneth Ripple, had already met to map out the future work of the Committee.

AGENDA IX. Legislative Proposals to Change Rule-Making Procedures

No further consideration was given to this item.

AGENDA X. Report to the Judicial Conference

Mr. Spaniol was requested to prepare a report of the Committee to the Judicial Conference and to circulate it immediately to all Committee members for their approval.

AGENDA XI. Time and Place of the Next Committee Meeting

The Committee decided to hold its next meeting in Washington, D.C. on January 13-14, 1983.

Respectfully submitted,

Joseph F. Spaniol, Jr.
Secretary

August 25, 1982